## O'DONNELL *v.* COMMONWEALTH.

Sept. 15, 1908.

[62 S. E. 373.]

**1. Criminal Law—Presumption of Innocence.**—One charged with crime is presumed to be innocent until his guilt is established by the evidence beyond every reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 14, Criminal Law, § 731.]

**2. Intoxicating Liquors—Sales to Persons "Intoxicated."**—The word "intoxicated" in an indictment charging a violation of Acts 1908, p. 284, c. 189, § 19, providing that no person shall knowingly sell intoxicating liquor to any intoxicated person, means a materially changed condition produced by the immoderate or excessive use of intoxicants, as contrasted with normal condition and conduct.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 29, Intoxicating Liquors, § 177.

For other definitions, see Words and Phrases, vol. 4, pp. 3734-3736.]

**3. Same—Illegal Sales—Persons Liable—"Knowingly Sell."**—Under Acts 1908, p. 284, c. 189, § 19, providing that "no person * * * shall knowingly sell [ardent spirits] to any intoxicated person," and section 27, p. 286, declaring that any person violating any of the provisions of the act shall be guilty of a misdemeanor, a licensed barkeeper is criminally liable for a sale of liquor to an intoxicated person made in the conduct of the business by the keeper's son employed in the barroom and intrusted with the conduct of the same in the absence of the barkeeper, though the barkeeper was at the time of the sale absent from the place of business; the term "knowingly sell" being referable to the condition of the person to whom the liquor is sold, and not to the sale.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 29, Intoxicating Liquors, § 192.]

**4. Same.**—The rule that a principal is bound for the acts of his agent done not only without his authority, but in violation of his instructions, in the sale of ardent spirits, is based on the postulate that a man engaging in this business as a licensee of the state engages in it at his peril, and must see to it that the requirements of the law are complied with; and is an exception to the general rule that the doctrine of respondeat superior does not apply to criminal cases.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 29, Intoxicating Liquors, §§ 189-192.]

**5. Same—Intention—Element of Offense.**—Intention is not necessary to the offense of an illegal sale of intoxicating liquors, and such a sale, whether made by the principal, or by his clerk, is all that is

necessary to be proved to make out the offense, provided that the sale made by the clerk is made in the conduct of the business with which he is charged by the principal.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 29, Intoxicating Liquors, §§ 189-192.]

Error to Circuit Court, Rockingham County.

Daniel O'Donnell was convicted of selling liquor to a intoxicated person, and he brings error. Affirmed.

The following are the instructions of the court:

"(1) The jury are instructed that the defendant is presumed to be innocent until and unless his guilt is established by the evidence beyond every reasonable doubt.

"(2) The court instructs the jury that the word 'intoxicated,' as used in the indictment, means a materially changed condition produced by the immoderate or excessive use of intoxicants, as contrasted with normal condition and conduct.

"(3) The jury are instructed that even though they may believe from the evidence that the defendant, O'Donnell, did on the 26th day of May, 1908, sell intoxicating liquor to J. N. Sherrard, and that the said Sherrard was at the time of such sale in an intoxicated condition, that yet they must find the defendant not guilty, unless they further believe from the evidence that at the time of such sale the defendant, or his salesman who sold the liquor, knew that said Sherrard was intoxicated.

"(4) The court instructs the jury that if they believe from the evidence that J. L. Sherrard purchased half a pint of whiskey at the barroom of Daniel O'Donnell on the 26th day of May, 1908, whether said purchase was made from said O'Donnell or some person employed by him in his said barroom, and that at the time of the said sale the said Sherrard was intoxicated and that said intoxication of said Sherrard at that time was perfectly apparent, so that the seller must have observed the fact that he was intoxicated, they shall find the accused guilty, and shall ascertain his punishment, which shall be a fine of not less than $50 nor more than $100."

*D. O. Dechert,* for plaintiff in error.

*Wm. A. Anderson, Atty. Gen.,* for the commonwealth.

CARDWELL, J. Section 19 of the act of Assembly approved March 12, 1908 (Acts 1908, p. 284, c. 189), commonly known as the "Byrd Liquor Law," provides, inter alia, that "no person * * * shall knowingly sell (ardent spirits) to any intoxicated person." And in section 27 of the act it is provided that "any person violating any of the provisions of * * * this act shall be

deemed guilty of a misdemeanor * * * and shall be fined not less than fifty dollars nor more than one hundred dollars * * * and shall be required to give bond for twelve months with approved security in the penalty of five hundred dollars, and conditioned that he will not violate the provisions of this act."

Plaintiff in error, Daniel O'Donnell, having a license to sell liquor by retail at his barroom in the town of Harrisonburg, in the county of Rockingham, was indicted in the circuit court of that county for a violation of the above statute, in that he did on the 26th day of May, 1908, sell to one J. L. Sherrard one-half pint of whisky, knowing the said Sherrard to be intoxicated. The case was tried on the plea of not guilty, the defendant found guilty; and his punishment ascertained by the jury to be a fine of $50, and the court gave judgment against him for the said fine and costs of the prosecution, and further required the defendant to execute bond with security in the penalty of $500, conditioned for his observance of the provisions of the act above mentioned.

We are asked to review and reverse this judgment on the ground that the verdict of the jury was contrary to the law and the evidence, and because the trial court erred in giving and refusing instructions.

That the sale of liquor was made as charged in the indictment is proved by the evidence beyond all question. In fact, the defendant, when testifying in his own behalf, practically admitted that fact; and we pass over the question whether or not Sherrard at the time of the sale to him was intoxicated, and the fact apparent to any one having occasion to observe his condition, with the remark only that the evidence not only tended to prove that such was his condition, but proved it beyond all reasonable doubt. The sole question, therefore, for our consideration is whether or not the jury were misdirected or misled by the instructions of the court.

Four instructions were given on behalf of the commonwealth, which will be set out with the official report of this opinion. Practically the only objection made to these instructions is that the court told the jury that if they believed from the evidence that J. L. Sherrard purchased half a pint of whiskey at the bar of Daniel O'Donnell on the 26th day of May, 1908, whether said purchase was made from said O'Donnell or some person employed by him in his said barroom, and at the time of said sale the said Sherrard was intoxicated, and that said intoxication of said Sherrard at the time was perfectly apparent so that the seller must have observed the fact that he was intoxicated, they shall find the accused guilty, etc. The instructions asked for by the defendant, which the court refused, sought to have the jury told

that the statute in a case of sale of ardent spirits such as is charged in the indictment contemplates actual knowledge on the part of the accused of the purchaser's condition. In other words, it was the purpose of the defendant to have the jury instructed that if they believed from the evidence that the sale of liquor was made to Sherrard, not by the defendant in person, but by his agent in the absence of the defendant, and without his knowledge, they could not find a verdict of guilty against him.

The sale in question was made, as the evidence shows, by the son of the defendant, who was employed by the latter in his barroom and intrusted with the conduct of the same in the absence of the defendant; and the evidence also shows that the defendant at the time of the sale to Sherrard was, in fact, absent from his place of business.

Much stress is laid by counsel for the defendant in the argument of the case here upon the fact that the language of the statute is that no person shall knowingly sell to an intoxicated person, and he argues that, if the defendant did not know himself that Sherrard was intoxicated when the sale of the whiskey was made by his clerk, there could be no conviction in this case.

Clearly, as it appears to us, the term "knowingly sell" is referable to the condition of the person to whom the liquor is sold, and not to the sale; for manifestly, if that interpretation of the language were adopted, the whole purpose of the statute would be defeated, as the penalty for making the prohibited sale could be easily avoided. It would be necessary only, under that interpretation of the statute, for a person engaged in the business of selling ardent spirits to absent himself from his place of business and leave his clerks free to make sales to any and all persons, regardless of their condition or age. It is true that the person who actually makes the sale is liable to prosecution under the statute, as well as the proprietor of the place of business where the prohibited sale is made; but this does not relieve the proprietor of responsibility for the illegal sale.

There is unquestionably a decided conflict in the cases with reference to the criminal and penal liability of a principal or master for violation of liquor laws by an agent or servant; but this conflict in a large measure grows out of the differences to be found in the various statutes of the states in which the cases on this subject were adjudicated.

To the case of Williams v. Hendricks, 115 Ala. 277, 22 South. 439, 41 L. R. A. 650, 67 Am. St. Rep. 32, there is a note citing a large number of these cases, some of which are entirely irreconcilable in principle with others of them; but, as stated, this conflict is due to the phraseology of the various statutes of the character of the one which we have under consideration.

In Carroll *v.* State, 63 Md. 551, 3 Atl. 29, it was held that the principal is bound by the act of his agent in selling liquor to a minor in violation of the law, if the agent is pursuing the ordinary business entrusted to him by such principal, on the ground that intention is not an essential element of the offense, but that the offense is constituted by the act of selling, whether done by the principal or by his agent, and that this is true, even though the agent had violated the instructions of his principal in making such sale.

In State *v.* Kittellee, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698, it was held that "the proprietor of a barroom is criminally liable for the unlawful sale of intoxicating liquor to a minor by his clerk, although it is made in his absence, without his knowledge, and in violation of his instructions." Under the statute involved in that case, knowledge of the infancy of the person to whom the liquor was sold was an essential element of the crime, and the court held necessarily that the agent's knowledge should be imputed to the principal; the opinion saying that the doctrine that the agent's knowledge is the knowledge of the principal applies on a sale of intoxicating liquors to a minor by a clerk, to the statutory presumption of knowledge as to the age of the purchaser. True, the language of that statute was that the dealer in intoxicating liquors should not sell directly or indirectly to any unmarried minor; but, upon reading the opinion of the court, it is clear that the court considered that the principles controlling in such a case would make the principal liable irrespective of these words.

The same view was taken in Zeigler *v.* Commonwealth (Pa.) 14 Atl. 237, cited in the note to Williams *v.* Hendricks, supra, which was a prosecution for willfully furnishing liquor to persons of known intemperate habits, in which it was alleged that the liquor was furnished by a clerk without authority. The decision in that case was based upon the principle that in misdemeanors there are no accessories, but all are implicated as principals, and that the question of agency had nothing to do with the case.

In State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315, a druggist was held to be liable and was fined for a sale by his clerk, without his knowledge, and contrary to his instructions; the prosecution in that case being under a statute providing that "no person without a state license therefor shall * * * sell, offer or expose for sale spirituous liquors, wines, porter, ale or beer, or any drink of like nature;" and there, as in the case before us, it was contended that, as the sale was shown to have been made, not by the accused, but by his clerk, without his knowledge and contrary to his directions, he was wholly innocent of any wrong in-

tent or purpose to violate the law, and therefore innocent of any offense. The court in an opinion by Snyder, J., carefully considered the question, and reached the conclusion above mentioned. In the opinion it is said: "The authorities are numerous to the effect that, when statutes prohibit or command an act to be done without qualification, in such cases ignorance or mistake of fact will not excuse their violation. This is peculiarly the case in regard to statutes respecting revenue and police matters, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the party to know the facts and to obey the law at his peril. Many of the cases sustaining this view will be found annotated in a note to Farrell v. State, 32 Ohio St. 456, 30 Am. Rep. 617, and the result there deduced from the cases is stated thus: 'First. When to an offense knowledge of certain facts is essential, then ignorance of these facts is a defense. Second. When a statute makes an act indictable irrespective of guilty knowledge, then ignorance of fact is no defense.' * * * I deem it unnecessary to express any opinion as to the weight of authority on this subject in other states, because I consider the law of the case at bar plain under our statutes and the former rulings of this court." Further on the opinion, quoting from State v. Cain, 9 W. Va. 559, says: "'As to whether the seller intended to violate the law or not at the time of selling to the minor is, under the authorities cited, immaterial, except in mitigation of the punishment.' * * *" And in reference to offenses of a different character and the decisions of other states this further quotation is made: "'It is true that with us in felonies, and most cases of misdemeanor under the common law, intent is regarded as being one of the chief elements necessary to constitute the crime or offense, but under this statute the commission of the act prohibited constitutes the offense. This is manifest, I think, from the legislation to which I have referred. I am aware that the highest courts of several of the states have differed in the construction of similar legislation. Some of them have taken the view I have presented, and others a different view. But I apprehend, if the courts of the states adopting a different view from that I have taken had considered their legislation such as required them to construe the legislation as remedial and not penal, they would have arrived at the same conclusion I have felt myself bound to adopt in this case.'"

In the case from which we have just made quotations, as in the case at bar, it was not questioned that the liquor sold was the property of the defendant, that the clerk who sold it was the agent of the defendant, and as such authorized to sell the liquor according to law; nor is it pretended that the defendant did not

get the money paid for the liquor. It is true that the statute under consideration in State v. Denoon, supra, contained the language "by one person for another," but nevertheless the opinion says that "by the positive command of the statute both the clerk and the defendant are guilty of the offense, and they may be indicted and punished either jointly or separately. It is wholly immaterial, under the positive prohibition and policy of the statute, what the instructions were from the defendant to his clerk, or that the sale was in violation of his instructions. Neither the motives nor the intent of the defendant, nor his purpose to obey the law, can relieve him, when it is shown that a sale in violation of the statute was actually and purposely made either by himself or by another for him. The clerk knew he was selling the liquor, and the proof shows that he was selling it as the agent of and for the defendant. If the purpose had been to sell a wholly different thing from that which was in fact sold, an article the sale of which was not prohibited, then the motive and intent might be material. * * *" A number of authorities are cited in that case for the view taken by the court, among which are 1 Whart. Crim. Law, § 247; Commonwealth v. Kelly, 140 Mass. 441, 5 N. E. 834; Dudley v. Sautbine, 49 Iowa, 650, 31 Am. Rep. 165; People v. Blake, 52 Mich. 566, 18 N. W. 360. See, also, People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; Noecker v. People, 91 Ill. 494.

We quite agree with the view taken by the learned Attorney General in his argument of this case, that the cases which hold that a principal is bound for the acts of his agent, done not only without his authority, but in violation of his instructions in the making of the sale of ardent spirits, constitute an exception to the general rule that the doctrine of respondeat superior does not apply to criminal cases, and that the doctrine is based upon the postulate that a man who engages in this business as a licensee of the state engages in it at his peril, must see to it that the requirements of the law are rigidly complied with, and is responsible for any failure of any agent of his to comply with those requirements.

If this be not the correct doctrine, then the statute we have now under review would prove a dead letter, and the evil—namely, the sale of ardent spirits to persons already intoxicated—would not, and could not, be removed. Any other view of this remedial statute would leave the way open for the vendors of ardent spirits to make the sale prohibited without fear of punishment. Moreover, if a barkeeper could shield himself behind the claim that he was ignorant of the illegal acts of his clerk or agent in the sale of ardent spirits, violations of the prohibited acts by his tacit connivance would, without doubt, be increased rather

than diminished, and thus render farcical all efforts to suppress the evil at which the statute is aimed.

We fully concur in the view taken in the cases and by the text-writers cited above that intention is not a necessary element in the offense of an illegal sale of intoxicating liquors, and that such a sale, whether made by the principal or by his clerk or agent, is all that is necessary to be proved in order to make out the offense, provided only that the sale be made by the clerk or agent in the conduct of the business with which he was charged by the principal, as proved in this case.

The statute is clearly broad enough to hold the master responsible for all acts of his employee, whether authorized or permitted by him or not, under the exception to the general rule as stated in 23 Cyc. 207, relied on by the defendant.

We are of opinion, therefore, that the judgment of the circuit court is right; and it is affirmed.

Affirmed.